SUPREME COURT, U.S.
FILED
061700 JUN 18 2007
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT of the UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

VINCENT McFADDEN,
Respondent.

On Petition for Writ of Certiorari To The Missouri Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
Chief Counsel, Criminal Division
DANIEL N. McPHERSON
Assistant Attorney General
Counsel of Record

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

CAPITAL CASE
QUESTIONS PRESENTED

1. In reviewing a *Batson* challenge, can an appellate court disregard the holding of *Purkett v. Elem*, 514 U.S. 765 (1986), and determine – based on unsubstantiated assertions of defense counsel – that a particular fashion statement or hair style is common among members of a particular race and, thus, that a peremptory strike based on a person's "crazy red hair" is not race-neutral and is, in fact, indicative of racial discrimination?

2. Where one of the aggravating circumstances supporting a jury's death sentence verdict is a murder conviction that was subsequently reversed, can an appellate court disregard *Romano v. Oklahoma*, 512 U.S. 1 (1994), and overturn the death sentence based on the mere possibility that the jury may have been affected by the knowledge that the respondent was already under a sentence of death for the subsequently invalidated conviction, particularly when it was the respondent who introduced the subject of the previous death sentence to the jury and the State did not unduly emphasize that information during the penalty phase of the trial?

PARTIES TO THE PROCEEDING

The petitioner, State of Missouri, was the respondent below. The respondent, Vincent McFadden, was the appellant.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION AND STATEMENT 3

REASONS FOR GRANTING THE WRIT 7

I. In holding that the prosecutor's reason for striking Venireperson S.H. was neither race-neutral nor legitimate," the Missouri Supreme Court departed from the holding of *Purkett v. Elem*, where this Court made plain that hair style is not a characteristic peculiar to any race 7

II. The Missouri Supreme Court, in conflict with *Romano v. Oklahoma*, reversed the respondent's death sentence based on speculation that the jury's knowledge of respondent's death sentence in another case affected the jury's weighing process and made it more likely to impose the death penalty 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986).. 3, 4, 6, 7, 10, 11

Brown v. Sanders, 126 S. Ct. 884 (2006)..... 12

Hernandez v. New York, 500 U.S. 352 (1991)..... 7, 8

Purkett v. Elem, 514 U.S. 765 (1995)....i, iii, 6, 7, 8, 9, 10

Romano v. Oklahoma, 512 U.S. 1 (1994)..i, iii, 12, 13, 14

State v. Ferguson, 20 S.W.3d 485 (Mo. 2000)..... 13

State v. Kinder, 942 S.W.2d 313 (Mo. 1996)..... 13

State v. McFadden, 191 S.W.3d 648 (Mo. 2006).. 5, 12

United States v. Roan Eagle, 867 F.2d 436 (8th Cir. 1989)..... 10

Other Authorities

28 U.S.C. § 1257 1

Robert Patrick, Red Hair: Why's that a Problem?, St. L. Post-Dispatch, Mar. 23, 2007..... 9

OPINIONS BELOW

The opinion of the Missouri Supreme Court reversing the trial court's judgment and sentence, filed March 20, 2007, and reported at 216 S.W.3d 673 (Mo. 2007), is reprinted in the Appendix ("App.") at A2-A27.

JURISDICTION

The Missouri Supreme Court entered its judgment on March 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment V:

> No person shall be . . .deprived of life, liberty or property without due process of law . . . .

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, § 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to

any person within its jurisdiction the equal protection of the laws.

INTRODUCTION AND STATEMENT

1. This case turns on the use of a peremptory challenge to remove a venireperson who had distinguished herself by dying her hair "a color of red brighter than the ink that comes out of a red pen or marker." *See* App. at A13.

At the close of voir dire, the State used four of its nine peremptory challenges to remove African-American venirepersons from the panel, and one peremptory challenge to remove an Asian-American. The respondent raised a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), asserting that the State's strikes were motivated by purposeful racial discrimination. (In Missouri, to initiate a *Batson* hearing, the defendant need only identify the racial group of the stricken venirepersons – there is no additional showing that is necessary at that point.) The State responded with race-neutral reasons for each strike. The respondent was then given the opportunity to prove that the State's reasons were pretextual.

After hearing the State's race-neutral explanations, the respondent waived his *Batson* challenges as to two of the stricken venirepersons. But the respondent did present arguments as to the other three venirepersons, and the prosecutor responded. The trial court then evaluated the State's reasons, considered the respondent's arguments and concluded – based on the court's review of case law and of portions of the voir dire transcript, on the court's long experience with the prosecutor, and on the court's own observations of the voir dire proceedings – that the strikes were not motivated by racial discrimination.

More specifically, when challenged for his strike of venireperson S.H., the prosecutor said that he struck her because of her "crazy-looking red hair," because she did not have a driver's license, and because her demeanor in the death-qualification portion of the voir dire "appeared to me to be hostile to the – at least to the process, if not to me personally." (Tr. 950). The prosecutor described S.H.'s hair as "a color of red brighter than the ink that comes out of a red pen or a marker." (Tr. 950). He later elaborated that in regards to S.H.'s hair, he felt that she was trying to set herself apart from the crowd and that, "I don't need somebody with – that has some sort of weird or crazy attitude towards her appearance to be getting back in the jury." (Tr. 963). The prosecutor also acknowledged that lack of a driver's license was not a major factor by itself, but when combined with S.H.'s appearance and her demeanor during voir dire, he did not think that she would ever return a verdict of death. (Tr. 966).

In overruling the *Batson* challenge, the trial judge noted that he observed S.H. to be "very offended" by the prosecutor's questions about her lack of a driver's license. (Tr. 968). The judge also noted that S.H.'s red hair "does distinguish her and makes her separate from the crowd, and very individualistic. And Mr. Bishop [the prosecutor] from his prosecutorial experience does not necessarily want that on a jury." (Tr. 973). The trial judge also observed that he had "tried probably seven to ten cases with Mr. Bishop over a five and a half year period. Mr. Bishop, in fact, has avoided on many occasions attempting to even get into a Batson type challenge area . . . [a]nd he shows no racial animus . . . in this case, nor any other cases." (Tr. 969-70).

At the conclusion of the trial, the jury found the existence of several statutory aggravating circumstances beyond a reasonable doubt and returned a sentence of death. (L.F. 391-92). Those aggravating circumstances were respondent's conviction on April 22, 2005, of murder in the first degree and armed criminal action for killing Todd Franklin; and his conviction on February 4, 2005, for two counts of assault in the first degree and two counts of armed criminal action that were unrelated to the Franklin murder. (L.F. 391-92). The jury first learned that the conviction on the Todd Franklin murder carried a death sentence when defense counsel brought up the subject during the voir dire. (Tr. 195, 262, 324, 404, 474, 523, 578, 638, 699, 748). On May 16, 2006, the Missouri Supreme Court overturned the murder and armed criminal action convictions and the sentence of death for the murder of Todd Franklin. *State v. McFadden*, 191 S.W.3d 648, 650 (Mo. 2006). The trial court sentenced the respondent in this case eight days later, on May 24, 2006. (L.F. 9).

2. On appeal, a five-judge majority of the Missouri Supreme Court concluded that the State had engaged in purposeful racial discrimination in the peremptory strike of S.H. App. at A5, A7. The majority stated that it was "dubious" whether the State's explanation was race-neutral, asserting that "defense counsel refuted the State's conclusion that S.H.'s hair color was crazy and noted that S.H. was neatly dressed." App. at A6. The majority accused the State and the trial court of presuming to identify difference from a "limited cultural view." App. at A7. The majority also characterized the prosecutor's

belief that S.H. appeared hostile as a "misperception." App. at A7.

The majority also found that respondent's sentence was invalid because it rested on an invalid aggravating circumstance, namely, the subsequently overturned convictions for the Todd Franklin murder. App. at A11. The majority stated that it "[could not] assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that McFadden was already sentenced to death." App. at A11.

Two judges dissented, concluding, based on *Purkett v. Elem*, 514 U.S. 765 (1995), that the venireperson's red hair was "indeed a race-neutral explanation." App. at A25. The dissenters set forth in detail the prosecutor's explanations for exercising the strike and the trial court's explanation for upholding the strike, and concluded that it was "clear from the record that the prosecutor and judge went to great lengths to follow the letter of the law regarding *Batson* procedures and to assure that the peremptory strike was free of racial bias." App. at A25.

Finding that the concern over S.H.'s appearance was a race-neutral reason, the dissenters concluded that "the majority gives nothing but lip service to the fundamental tenets of *Batson* jurisprudence 'that peremptory strikes are subjective, and great reliance is placed on the trial court's assessment of the legitimacy of the State's explanation.'" App. at A26.

The dissenters did concur with the majority that respondent was entitled to a new penalty phase

trial because of the admission of evidence that he had been convicted of an earlier murder. App. at A27. The dissenters found that reversal of that conviction mandated reversal in the instant case. App. at A27.

REASONS FOR GRANTING THE WRIT

I. In holding that the prosecutor's reason for striking Venireperson S.H. was neither race-neutral nor "legitimate," the Missouri Supreme Court departed from the holding of *Purkett v. Elem*, where this Court made plain that hair style is not a characteristic peculiar to any race.

In *Purkett v. Elem*, the Court summarized the basic steps that must be followed when a claim of racial discrimination is raised regarding the exercise of peremptory challenges. "Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two)." *Purkett v. Elem*, 514 U.S. 765, 766 (1995). "If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." *Id.*

The Court has repeatedly stressed that a race-neutral explanation means an explanation based on something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 360 (1991). Indeed, "Unless a discriminatory intent is inherent

in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*

Thus, in *Purkett v. Elem*, in considering whether a juror's beard and unkempt hair could form the basis for a peremptory strike, the Court held that "the prosecutor's proffered explanation in this case – that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard – is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike." 514 U.S. at 769. The Court observed that neither the wearing of beards nor the growing of long, unkempt hair were characteristics that were peculiar to any race. *Id.*; *see also Hernandez*, 500 U.S. at 361 (concluding that striking bilingual jurors for fear they would not accept the official court translator's rendition of Spanish-language testimony did not rest on stereotypical assumptions about Hispanics or bilinguals). The Court did not ask whether such an unusual appearance might be more common among those of one race than among those of another, nor did the Court suggest that such an inquiry would be appropriate.

In the respondent's case, the Missouri Supreme Court ignored *Purkett* and stated: "whether the State's explanation is race-neutral to begin with is dubious." App. at A6. The Court then recited defense counsel's more positive perception of S.H.'s appearance, and concluded that the prosecutor's contrary perceptions were "far from neutral." App. at A7. And, finally, having concluded that the explanation was not race-neutral, the Court concluded that the prosecutor's explanation was not "legitimate," and that it was "merely a pretext to

exercise a peremptory strike for racially discriminatory reasons." App. at A7.

But in reaching these conclusions, the Missouri Supreme Court did not explain how a person's "crazy red hair" is anything other than race neutral. Instead, the Missouri Supreme Court concluded that defense counsel had "refuted the State's conclusion that S.H.'s hair color was crazy." App. at A6. Defense counsel had apparently "refuted" the prosecutor's conclusion by explaining that "S.H.'s hair color, though perhaps uncommon among the prosecutor's acquaintances, was quite fashionable in the African-American community." App. at A5.

In short, the Missouri Supreme Court simply uncritically accepted the assertions of defense counsel both at trial and on appeal that S.H.'s hair color was "quite fashionable" in the African-American community. *See* App. at A5. But even if that assertion is true, the standard set by this Court is whether the juror was being struck for a characteristic peculiar to her race – not whether the characteristic is sometimes exhibited by members of her race. *Purkett*, 514 U.S. at 769. And, here, no showing was made to the trial court or to the Missouri Supreme Court that only African-American women dye their hair bright red. Indeed, S.H. herself, in an interview given after the Missouri Supreme Court issued its opinion, questioned why her hair color was an issue, noting that "white people have red hair." Robert Patrick, *Red Hair: Why's that a Problem?*, St. L. Post-Dispatch, Mar. 23, 2007, at D11. App. at A29.

In accepting defense counsel's assertion that bright red hair is "quite fashionable" among African-

Americans, it was the Missouri Supreme Court, and not the prosecutor, that allowed an unsubstantiated stereotype (or "a limited cultural view") to influence its decision. That simply does not square with *Purkett v. Elem* and numerous other cases that have declined to attach racial significance to non-racial characteristics. *See United States v. Roan Eagle*, 867 F.2d 436, 441-42 (8th Cir. 1989) (rejecting an argument that a peremptory strike of a Native American for being "slovenly" was essentially racist).

And it places appellate courts in a position not contemplated in *Batson*. There the Court noted, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986).

Here, the Missouri Supreme Court gave no deference to the trial court's findings, and, instead, the Court determined that defense counsel had "refuted" the prosecutor's reasoning with the assertion that bright red hair is "quite fashionable in the African-American community." App. at A6. In short, without even mentioning *Purkett v. Elem*, the Missouri Court simply applied a racial gloss to a physical characteristic that this Court has previously deemed to be race neutral. If such a rule is allowed to stand, and if it is adopted by other states, the scope of *Batson* will be greatly expanded and the ability of attorneys to exercise peremptory strikes will be significantly impinged. Appellate courts will be free to decree virtually any characteristic used to justify a peremptory strike as a surrogate for racial discrimination. All that a defendant's lawyer will have to do is to make a credible assertion that a

characteristic that is uncommon even among members of a particular race is accepted to a greater degree in that race than it is in another – not that the characteristic is unusual to that race. And the only necessary evidence to support such a conclusion can be something as insubstantial as defense counsel's assertions at trial.

Thus, for instance, a person who watches basketball on television might conclude that tattoos are an acceptable fashion statement among African-Americans. Under the Missouri Supreme Court's analysis, peremptorily striking an African-American juror for having numerous prominent tattoos covering his body could then be deemed racial discrimination because tattoos are "fashionable in the African-American community." But, of course, such a limited cultural view overlooks the fact that such tattoos are also fashionable among some Caucasians – just as brightly dyed hair (including red or orange hair) is also fashionable among some segment of the Caucasian population.

In short, the standard used by the Missouri Supreme Court will permit a finding that a strike based on a certain characteristic is discriminatory, absent any evidence that the attorney making the strike considered the characteristic to be racial in nature. But *Batson* seeks to prevent *purposeful* racial discrimination in the selection of a jury. *Batson*, 476 U.S. at 86 (emphasis added). The *Batson* analysis is designed to assess the prosecutor's motive in making peremptory strikes. *Id.* at 97, 98. And by finding a facially race-neutral explanation to be discriminatory, the Missouri Supreme Court disregarded any consideration of the prosecutor's

actual beliefs and motives, and instead adjudged the case solely through the prism of its own perceptions.

II. The Missouri Supreme Court, in conflict with *Romano v. Oklahoma*, reversed the respondent's death sentence based on speculation that the jury's knowledge of respondent's death sentence in another case affected the jury's weighing process and made it more likely to impose the death penalty.

Two of the six statutory aggravating circumstances that the jury found beyond a reasonable doubt were the respondent's prior convictions for murder in the first degree and armed criminal action in the shooting death of Todd Franklin. (L.F. 391-92). Those two aggravating circumstances were rendered invalid when the Missouri Supreme Court reversed and remanded respondent's conviction in the Todd Franklin murder. *State v. McFadden*, 191 S.W.3d 648, 650 (Mo. 2006).

In *Brown v. Sanders*, 126 S. Ct. 884 (2006), the Court stated the test for determining when the presence of an invalid aggravating circumstance requires reversal:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer

> to give aggravating weight to the same facts and circumstances.

Id. at 892 (emphasis in original). The Court went on to explain that no constitutional error occurs where evidence supporting the invalidated factor is properly admitted, and the jury can give aggravating weight to that same evidence under the rubric of some other, valid aggravating factor. *Id.*

The State in this case presented evidence of Todd Franklin's murder separate and apart from the fact of the conviction and sentence that was subsequently reversed. In Missouri, unadjudicated bad acts are admissible as non-statutory aggravating circumstances, so the prosecutor's ability to present that evidence to the jury was not dependant on the fact of the prior conviction. *State v. Ferguson*, 20 S.W.3d 485, 500 (Mo. 2000); *State v. Kinder*, 942 S.W.2d 313, 331 (Mo. 1996). Therefore, the jury could properly give aggravating weight to that evidence as a non-statutory circumstance, thus meeting the *Brown* standard.

The Missouri Supreme Court nonetheless found that even if the evidence was admissible as non-statutory aggravating prior bad acts, it could not assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that respondent already faced a death sentence. App. at A11. In so ruling, the Missouri Supreme Court acted in contradiction to this Court's holding in *Romano v. Oklahoma*, 512 U.S. 1, 14 (1994). *Romano* also involved admission of evidence of a prior death sentence that was later invalidated. *Id.* at 3, 5. The defendant in that case argued that admission of his prior death sentence diminished the sentencing

jury's sense of responsibility. *Id.* at 9. The Court rejected that argument, finding that it was impossible to know how evidence of the prior death sentence affected the jury. *Id.* at 14. The Court stated that it was equally plausible that the evidence could have made the jury more inclined to impose a death sentence, or less inclined to do so. *Id.* As a result, a holding that admission of the evidence rendered the sentencing proceeding fundamentally unfair "would . . .be an exercise in speculation, rather than reasoned judgment." *Id.* The Missouri Supreme Court engaged in exactly the type of speculation condemned by this Court in *Romano* to reach a result that conflicts with that decision.

This case also raises the question of whether a criminal defendant is entitled to reversal due to the jury's knowledge of an invalidated death sentence, when it was defense counsel who injected the subject into the case. The jury first learned about the previous death sentence during defense counsel's questioning in the small group voir dire on death qualification. (Tr. 195, 262, 324, 404, 474, 523, 578, 638, 699, 748). The State's only mention of the previous death sentence was one brief reference during the penalty phase opening statement, and the admission of a court document that was read to the jury, setting out the fact that the respondent was sentenced to death for Todd Franklin's murder. (Tr. 1268, 1291). The Missouri Supreme Court's decision implies that a jury's knowledge of an invalidated death sentence is *per se* prejudicial, regardless of which party brought the information before the jury, placing the decision even further at-odds with the precedents cited above.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,
JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
Chief Counsel, Criminal Division

DANIEL N. McPHERSON
Assistant Attorney General
Counsel of Record

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

59

(2)

Supreme Court, U.S.
FILED
061700 JUN 18 2007
OFFICE OF THE CLERK

No. _____

In the

SUPREME COURT of the UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

VINCENT McFADDEN,
Respondent.

On Petition for Writ of Certiorari To The Missouri Supreme Court

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor

DANIEL N. McPHERSON
Assistant Attorney General
Counsel of Record

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

TABLE OF CONTENTS

Opinion in State of Missouri v. Vincent McFadden, No. 87753 (Mo. banc) A-2

Opinion concurring in part and dissenting in part in State v. Vincent McFadden, No. 87753 Mo. banc) A-12

Newspaper article from *St. Louis Post-Dispatch* A-28

Supreme Court of Missouri
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	**SC87753**
	)	
VINCENT MCFADDEN,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
The Honorable Gary M. Gaertner, Jr., Judge

PER CURIAM

I.

A jury convicted Vincent McFadden of first-degree murder, armed criminal action, and witness tampering. McFadden was given the death penalty consistent with the jury's recommendation. This Court has exclusive jurisdiction pursuant to Mo. Const. art. V, sec. 3. Among his fourteen points of error, McFadden raises valid challenges under *Batson v. Kentucky* and *Johnson v. Mississippi*. The judgment is reversed, and the case is remanded.

II.

The facts, which this Court reviews in the light most favorable to the verdict,[1] indicate that, on May 15, 2003, McFadden shot and killed Leslie

---

[1] *State v. Taylor*, 134 S.W.3d 21, 24 (Mo. banc 2004).

Addison and threatened Leslie's sister, Eva, so that Eva would not testify against McFadden.

At trial, the State exercised five of its nine peremptory strikes to remove one Asian and four African-American venirepersons. The only remaining African-American was removed for hardship, leaving McFadden with an all-white jury. Defense counsel challenged the strikes under *Batson v. Kentucky*.[2] The State attempted to justify the strikes with race-neutral explanations, which defense counsel argued were pretextual. The trial court denied McFadden's *Batson* claims. The jury found McFadden guilty of all charges.

During the penalty phase, the State introduced evidence of McFadden's convictions and death sentence in an unrelated case as aggravating factors supporting capital punishment in this case. The jury cited the earlier convictions as statutory aggravators and recommended a sentence of death. On May 16, 2006, this Court reversed those earlier convictions in *State v. McFadden* (*McFadden I*).[3] On May 24, 2006, the trial court in the present case sentenced McFadden to death plus 82 years imprisonment.

III.

This Court elaborated on the principles of *Batson* and its progeny in *McFadden I*. To

---

[2] 476 U.S. 79 (1986). As this Court cautioned in *McFadden I*, "racial discrimination in jury selection compromises the defendant's right to a trial by an impartial jury." Citing *Miller-El v. Dretke*, 125 S.Ct. 2317, 2323 (2005).

[3] *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006).

summarize, racial discrimination in jury selection violates the Equal Protection Clause of the Constitution of the United States.[4]

A defendant can establish a *prima facie* case of discriminatory jury selection by "the totality of the relevant facts" of the prosecutor's behavior during the defendant's trial.[5] When the State provides a race-neutral reason for exercising a peremptory strike that is more than an unsubstantiated denial of discriminatory purpose, the defense must show that the State's explanation is pretextual and the true reason for the strike is racial.[6] The trial court's findings on a *Batson* challenge will be set aside if they are clearly erroneous, meaning the reviewing court is left with the definite and firm conviction that a mistake has been made.[7] This Court has such a conviction here.

McFadden challenges on *Batson* grounds the State's exercise of peremptory strikes to remove two African-American women from the jury pool. The State claimed to remove venireperson D.C. because she participated in her church choir's annual Christmas concert at a local prison workhouse. The State claimed to remove venireperson S.H. because she did not have a driver's license, she had "crazy red

---

[4] *Strauder*, 100 U.S. at 308; *Miller-El*, 125 S.Ct. at 2324; *State v. Edwards*, 116 S.W.3d 511, 524 (Mo. banc 2003); *State v. Brown*, 958 S.W.2d 553, 553 (Mo. banc 1997); *State v. Parker*, 836 S.W.2d 930, 933 (Mo. banc 1992).

[5] *Batson*, 476 U.S. at 94. See also *Miller-El*, 125 S.Ct. at 2324; *Parker*, 836 S.W.2d at 933; *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. banc 1987).

[6] *Parker* at 939.

[7] *Edwards*, 116 S.W.3d at 525; *Antwine*, 743 S.W.2d at 66.

hair," and she seemed hostile. The Court finds a clear *Batson* violation in the State's removal of S.H. for having red hair. This being dispositive, the Court does not opine on the removal of D.C.

The trial court rejected the State's justification for removing S.H. for not having a driver's license and for seeming hostile. The court found the lack of driver's license irrelevant and perceived that S.H. was not hostile but merely exasperated by the State's interrogation concerning the license. In response to the State's justification for removal of S.H. because of her bright red hair,[8] defense counsel explained that S.H.'s hair color, though perhaps uncommon among the prosecutor's acquaintances, was quite fashionable in the African-American community. The trial court, sharing the prosecution's unfamiliarity, agreed that the look "[made] her separate from the crowd, and very individualistic" and allowed the strike.

Normally, evidence of discrimination is established when the State's reason for striking an African-American venireperson applies to an otherwise-similar member of another race who is permitted to serve.[9] It does not appear that there was a white juror with distinctive hair, but an identical comparison is not necessary. "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable."[10] In evaluating pretext, a trial

---

[8] The State elaborated on the hair color describing it as "Ronald McDonald's hair. It looked like clown red hair. It tended more towards the orange side."

[9] *Miller-El*, 125 S.Ct. at 2325; *Edwards*, 116 S.W.3d at 525; *Antwine*, 743 S.W.2d at 65.

[10] *Miller-El*, 125 S.Ct. at 2329, n. 6.

court considers whether the explanation is (1) race-neutral, (2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate.[11] The trial court's "chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case."[12]

Applying the foregoing factors, first, whether the State's explanation is race-neutral to begin with is dubious. The State relies on *State v. Williams*,[13] where the prosecutor exercised a peremptory strike to remove an African-American venireperson whose "earrings and clothing indicated that he was 'trying to be different' and was 'liberal.' "[14] This Court rejected that *Batson* challenge, finding that "striking a prospective juror based upon clothing and attire does not reflect an inherent racial bias."[15] Here, however, defense counsel refuted the State's conclusion that S.H.'s hair color was crazy and noted that S.H. was neatly dressed. The Court acknowledges that peremptory strikes are subjective, and great reliance is placed on the trial court's assessment of the legitimacy of the State's explanation.[16] In this case, however, the record suggests that the trial judge was initially inclined to sustain McFadden's *Batson* challenges but then retreated. The Court's deference to the trial court is not without limits. Viewing the totality of

---

[11] *Edwards*, 116 S.W.3d at 511.

[12] *Parker*, 836 S.W.2d at 939. See also *Miller-El*, 125 S.Ct. at 2331; *Edwards*, 116 S.W.3d at 527; *Antwine*, 743 S.W.2d at 64.

[13] 97 S.W.3d 462 (Mo. banc 2003).

[14] *Williams*, 97 S.W.3d at 471.

[15] Id.

[16] *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc.1998).

circumstances-the prosecution's disdain for S.H.'s red hair, his scrutiny of her lack of driver's license, and his misperception of her reaction as hostile-the prosecution's subjective assumptions about S.H. are far from neutral.[17]

Second, the State fails to articulate how S.H.'s red hair, even if it were as unusual as the prosecution found it, was related to the case other than another conclusional inference that S.H. was individualistic. Here again, the State and the trial court presume to identify difference from a limited cultural view. "[P]otential jurors are not products of a set of cookie cutters,"[18] nor should they be. Third, the State's explanation was clear and specific, to wit, "crazy-looking red hair," which renders clear the analysis of the fourth and fatal factor, legitimacy. The State's justification for removing S.H. because of her hair color is not legitimate. In light of the totality of facts and circumstances, the Court finds the prosecution's explanations implausible and merely a pretext to exercise a peremptory strike for racially discriminatory reasons. The trial court's denial of the McFadden's *Batson* challenge was clearly erroneous.

---

[17] In further regard to the prosecution's claim that S.H. was hostile, in *McFadden I* this Court noted that "vague references to attributes like demeanor 'are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race.' Accordingly, such vague references are heavily scrutinized." (Citing *Edwards,* 116 S.W.3d at 550 (Teitelman, J., concurring).)

[18] *Miller-El,* 125 S.Ct. at 2329, n. 6.

IV.

McFadden also asserts that the trial court erred in denying his motion for a new trial and sentencing him to death because the jury's penalty recommendation was based partially on McFadden's convictions and death sentence in an unrelated case that this Court reversed (*McFadden I*). As this issue may arise on retrial because the State argues the evidence is admissible as unadjudicated prior bad acts, it is necessary to address the issue in this case.

In April 2005, McFadden was convicted of murder and armed criminal action and received the death penalty in connection with the shooting death of Todd Franklin. In the present case, tried in March 2006, the State introduced McFadden's convictions in the Franklin case as two of six aggravating factors for the jury to consider in deciding punishment. On May 16, 2006, this Court issued its opinion in *McFadden I,* where it reversed and remanded the Franklin case, thereby vacating McFadden's convictions for murder and armed criminal action, as a result of five *Batson* violations by the same prosecutor who tried the present case. Despite this Court's reversal of the Franklin convictions, which constituted one-third of the jury's basis for recommending death in the present case, on May 24, the trial court followed the jury's recommendation and sentenced McFadden to death. Because the jury's recommendation in this case was based partly on factors that this Court nullified, the sentence cannot stand.

In *Johnson v. Mississippi*,[19] the United States Supreme Court held that the reversal of a prior conviction that the jury considered in imposing the death penalty undermines the validity of the sentence. During sentencing in that case, the prosecution introduced evidence of the defendant's prior felony conviction to persuade the jury to impose a death sentence, but the prior conviction was later vacated. The Supreme Court explained that "the reversal of the conviction deprive[d] the prosecutor's ... evidence of any relevance to Mississippi's sentencing decision."[20] The decision to impose death cannot be based on factors irrelevant to the sentencing process.[21]

This Court examined the effect of a reversed prior conviction in *State v. Storey*.[22] There, a prior conviction was used to impeach the defendant's credibility during the guilt phase of the trial. The conviction was subsequently reversed. The State conceded error. This Court held that the error was harmless because, among other reasons, the references were brief and not an attempt to develop a theme. Here, in contrast, the State's evidence during the penalty phase regarding McFadden's prior convictions and death sentence was voluminous, narrated in detail by witness testimony, and illustrated by over a dozen exhibits.

The State argues that *Johnson* does not mandate reversal here because, even if the Franklin *convictions* cannot now be used as statutory

---

[19] 486 U.S. 578 (1988).

[20] *Johnson*, 486 U.S. at 585.

[21] Id.

[22] 986 S.W.2d 462 (Mo. banc 1999).

aggravators, the underlying Franklin *facts* presented by the State still carry weight as unadjudicated prior bad acts, i.e., non-statutory aggravating circumstances. The State cites *Brown v. Sanders*[23] in which the United States Supreme Court explained:

> [A]n invalidated sentencing factor ... will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale ... *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.[24] (emphasis in original)

The Court rejects the State's implication that the Franklin convictions and death sentence were not critical to the jury's decision-making process. Of the six statutory factors on which the jury based its death penalty recommendation, only the two relating to the Franklin case involved a homicide. The other four involved assault and armed criminal action. The State implies that the jury's recommendation would have been the same based on these four weaker remaining factors. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."[25] In *Brown,* the Supreme Court cautioned that "such skewing will occur, and give rise to constitutional error, only

---

[23] 546 U.S. 212 (2006).

[24] *Brown v. Sanders,* 126 S.Ct. at 892.

[25] *Id.* citing *Stringer v. Black,* 503 U.S. 222, 232 (1992).

where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor."[26] The State notes that the jury is not instructed to weigh statutory aggravators more heavily than non-statutory aggravators. But even if the prosecution's evidence regarding the underlying facts of the Franklin homicide was properly admissible under the rubric of non-statutory aggravating prior bad acts, the Court cannot assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that McFadden was already sentenced to death. A sentence resting on factors this Court deems invalid is equally invalid.

V.

Because the foregoing claims are dispositive, it is not necessary to address the remaining grounds for appeal. The judgment is reversed and the case is remanded.

Wolff, C.J., Stith, Teitelman, Russell and White, JJ., concur; Limbaugh, J., concurs in part and dissents in part in separate opinion filed; Price, J., concurs in opinion of Limbaugh, J.

---

[26] *Brown v. Sanders*, 126 S.Ct. at 892.

Supreme Court of Missouri
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	**SC87753**
	)	
VINCENT MCFADDEN,	)	
	)	
Appellant.	)	

OPINION CONCURRING IN PART AND DISSENTING IN PART

I respectfully dissent from that part of the majority opinion addressing the *Batson* challenge.

The record does not support the majority's holding that "the prosecutor's explanations [were] implausible and merely pretext to exercise a peremptory strike for racially discriminatory reasons." So there is no mistake or misperception about the facts, it is necessary to include a full account of the exchange that transpired among the prosecutor, defense counsel and judge. When the prosecutor struck venireperson S.H., defense counsel identified her as an African-American female and challenged the prosecutor's peremptory strike as being made on the basis of race. The prosecutor then explained his reasons for striking S.H. as follows:

> Well, the first thing that anybody noticed about [S.H.], Juror Number 33,

is her crazy-looking hair. It is a red-a color of red brighter than the ink that comes out of a red pen or a marker. I'm not sure if it's a wig or it's her real hair.

She also doesn't have a driver's license, the only one in the panel who doesn't have a physical reason for not having a driver's license.

And her demeanor, especially in the death qualification, appeared to me to be hostile to the-at least to the process, if not to me personally, with her arm folded. I noticed as I was standing directly in front of her at one point her eyes were closed. I don't know for sure if she was sleeping, but she seemed completely disinterested in the process of death qualification, at least for part of my jury selection and death qualification.

She was very weak on the death penalty. She hesitated in her responses regarding the death penalty before she would answer on more than once, [sic] especially when I questioned her about signing the death verdict and she indicated that she would be able to consider that punishment. I believe from her demeanor, and her answers, that she was lying to me. That she would not, in fact, ever consider the death sentence under any circumstance, nor would she ever put herself in a position to where she would require-be

> required to sign a death verdict or announce that verdict in open court.

The trial court then found this explanation to be race-neutral.

At that point, defense counsel questioned whether S.H.'s hair color was relevant and speculated that S.H. could have been wearing a wig after going through chemotherapy. Counsel also argued that several women in the African-American community have their hair dyed that color as a fashion statement. Counsel also argued that the lack of a driver's license is not relevant, and she noted that several of her relatives did not have licenses. Counsel also stated that the prosecutor never made a record about S.H.'s demeanor, and that the bailiffs told her that they did not see S.H. sleeping or inattentive. Counsel also said that S.H. never indicated any hesitation on the death penalty.

The prosecutor responded:

> Well, with regard to what defense counsel has stated, even by defense counsel's own admission, this crazy red hair is at least some sort of statement. And she's obviously trying to set herself apart from the crowd. I don't need somebody with-that has some sort of weird or crazy attitude towards her appearance to be getting back in the jury.
>
> These jurors have to come to a unanimous verdict. She's obviously setting herself apart from the crowd,

for whatever reason, in a very open and notorious way. There's no similarly situated juror that has a crazy appearance, other than what-I would call him a goofball that was struck for cause that had a shaved head and ZZ Top beard, and tattoos on his head. I would have struck him, too, if he made it through, because he's obviously making a statement, too.

She is obviously not invested in the community if she doesn't even have a driver's license. What kind of identification does she have? That's my thought.

That's not the major thing. It's the crazy red hair. I found that her demeanor was hostile. And I'm not really concerned with what bailiffs or defense attorneys think. That's for the defense attorney to make their determination about how they view these jurors.

I know for a fact, as I stood in front of her during death qualifications, her eyes were closed. Now, I may have been really boring, she may have been thinking real hard, but I got the impression she wasn't listening to me. And I don't like when somebody is not going to listen to death qualification questioning.

If it were another part-I don't like

why they don't seem to be paying attention at all. But I understand as it goes on and on. But when you're in a small group death qualification, that's an issue. And when they're not looking at me, I make a mental note of it.

And I remember distinctly that she did not answer immediately upon me asking the question. That cannot be reflected in the record. If there's a pause, the record will not show question, whatever it is, pause, yes. It will just say yes.

I made a note of it. And I've tried over thirty jury trials. I've been involved in four death penalty cases. I know how to analyze a person's demeanor in determining whether or not they're going to be good for me or bad for me. I've had experiences both ways.

And based on her demeanor, and my analysis of her demeanor, and my experience selecting all these jurors in various jury trials over my ten-year career as a lawyer,-and further, I consulted with [another prosecutor], my co-counsel, and he had in his notes the word liar. That she, in fact-he, independently of me, also thought that she was not being truthful with regard to her views on the death penalty. We discussed it together. It was our decision that she is never going to

return a verdict of death. I question whether or not she's ever going to return a verdict of guilty no matter what the evidence is.

And it's for all those reasons that I struck her. There's no similarly situated juror. Those are race neutral reasons. It has nothing to do with her race. It has to do with whether a juror, I think, can follow the law or not. I don't think she's going to follow the law. I think no matter what I put on there, there's no way she could return a verdict of death.

That's the way I view it. If other people disagree, fine. But the way I view it, the way [the other prosecutor] viewed it, we saw that we don't think that she's ever going to return a verdict of death. And it's because of her demeanor, her answers, her appearance, and her status of an unlicensed driver.

I don't think that an unlicensed driver is that big of a deal. But you combine all of it, she's obviously sitting- I, in fact, asked her about her license. I thought, well, maybe if she's got some physical problem, I can't tell by looking at her, that's a reason why you wouldn't have a driver's license in St. Louis. She's not elderly. She probably looks to me like she's in her twenties.

> And it seems to me odd that somebody who especially has retail employment at her job as a Foot Locker employee, which would have, I would assume, varying hours, which would make it very difficult to get to work if you don't have a license, an ability to drive a car. That's what we experienced with the juror who didn't show up today, because she said she didn't have a ride, and didn't have a license.
>
> So those are my reasons. They are all race neutral. It has nothing to do with race.

Defense counsel then argued that S.H.'s hairstyle did not set her aside from the community of African-American women, so that the prosecutor's explanation "makes it even actually more of a racial issue." Counsel also disputed the idea that not having a driver's license means you are not invested in the community, and she criticized the prosecutor for not asking S.H. why she did not have a driver's license.

The judge then explained why he was denying the *Batson* challenge:

> With regard to Venireperson [S.H.], [the prosecutor] did-I have-the Court has gotten the transcripts of both the death penalty and the general voir dire of [S.H.]. And the Court has read those in detail, and especially the death qualification.

They are just very plain simple yes or no answers. And it's not-it doesn't give-doesn't reflect the pauses.

Do you normally put pauses in there?

COURT REPORTER: No.

THE COURT: So more importantly, with regard to the general voir dire in particular, [the prosecutor] stated going in-the Court is aware that a prosecutor or an attorney can't set somebody up in order to do a *Batson* strike by the type of specific questions to an individual. But when [the prosecutor] started questioning [S.H.] with regard to the driver's license, and started getting into more of the details, my perception of [S.H.] was she was very offended by that. And her-by going into that detail. And I'm not sure if [the prosecutor] had gone any further, she would not have been even more offended.

I don't-I didn't see any offense towards [the prosecutor] or towards the defense in the death penalty voir dire. But in the general voir dire, I did notice that.

With regard to the first point of any other similarly situated jurors, there are no similarly situated Caucasian jurors that were of a similar

physical mannerism, except for the individual that had the tattoos on his head, extensive beard, and a shaved head, who was stricken for cause much earlier on.

And there's no other similarly situated individuals that had such a hair style, or hair coloring, or stood out of the normal out of this panel, regardless if they were Caucasian or even African-American people in particular. So there's no other similarly situated individuals that way.

The third factor under that case of *Marlowe* [*State v. Marlowe,* 89 S.W.3d 464 (Mo. banc 2002)] is the prosecutor's credibility based upon the prosecutor's demeanor and statements during voir dire, and the Court's past experiences with [the prosecutor].

I've tried probably seven to ten cases with [the prosecutor] over a five and a half year period. [The prosecutor], in fact, has avoided on many occasions attempting to even get into a *Batson* type challenge area. He-I find that his voir dire is very straight, to the point. As a trial attorney, I'm not sure I could try the same type of case and get away with it. But he treats everybody the same, and it doesn't matter who they are. He sort of runs, says whatever he says, and goes right through it. And he shows no racial

animus. He is-in this case, nor any other cases.

In that case of *Hopkins* [*State v. Hopkins,* 140 S.W.3d 143 (Mo.App. E.D.2004)] we've been-the Eastern District Court of Appeals came out with an opinion on *Hopkins* in August 24, 2004, written by the Honorable Booker T. Shaw, that went into detail of did the prosecutor ask a number of questions against African-American jurors more, or the number of questions that were asked. And I've tried to keep track of the questioning [the prosecutor] did. And [the prosecutor] didn't specifically go to question African-American jurors.

There were, in my-he did not question the African-American jurors more than the Caucasian jurors. He didn't change his questions from a Caucasian person to an African-American, an African-American to a Caucasian.

So on the basis of the *Hopkins* type analysis of [the prosecutor's] voir dire, and his voir dires in the past, [the prosecutor] has clearly not been violative of any of those type of-in particular, we had one, two, three, four, five, five African-American females, one African-American-let's see. Six African-American females, one African-American male, and one Asian-American who made it to the general

voir dire after death qualification. One African-American female struck herself by failing to appear for approximately over two hours for the voir dire. One of the African-American males, in fact, was stricken for cause.

And at this point in time, [the prosecutor] has stricken [venirepersons D.C., L.P., S.H.]. And the Court and even defense counsel have acknowledged that those are race neutral reasons. And clearly the Court will say-there's no ability for the Court to say there's any ability to say, in fact, that there was any racial reason for any of those. Those were strictly for non-racial reasons.

And [the prosecutor's] record prosecuting these cases has been clear, how he's performed with regard to these cases.

We're going to [S.H.]. And the situation is the circuit judge, in fact, actually grew up in the City of St. Louis and actually attended St. Louis City Public Schools when he was young, and is very familiar, and actually worked for the City of St. Louis for a number of years. Worked for the City of St. Louis, worked in the Federal Court down in the City of St. Louis, and only left the City of St. Louis approximately seven or eight years ago from living in the City for thirty-two years.

And I'm out in the courthouse here. And St. Louis County is also a very racially diverse courthouse. And the red hair of [S.H.] is not a hairstyle that is-the Court has seen on a lot of-ever, really, before. And it is a very distinctive red hairstyle that [S.H.] has.

It may not be the same structure as somebody who looks like a skinhead, who left the jury for cause, but at the same time that is-that is a-you know, courts have been clear that the physical features of an individual are a race neutral reason. The United States Supreme Court in [*Purkett v. Elem,* 514 U.S. 765 (1995)], which is affirming of a secondary conviction. This was a prosecutor's proffered explanation for peremptory challenge of a black male: The jury had long unkempt hair, moustache and a beard, was race neutral and satisfied the prosecutor's burden of articulating a not discriminatory reason for the strike.

I think the red hair also, as [the prosecutor] indicates, does distinguish her and makes her separate from the crowd, and very individualistic. And [the prosecutor] from his prosecutorial experience does not necessarily want that on a jury.

And I think that based upon the second reason of the degree of logical

relevance between the proffered reason and the case to be tried, there is a case that people that are sort of out there on the fringe, whether by hair, or how they dress, or mannerisms, a prosecutor for a non-racial reason will not want that type of person on this case.

The explanation given for the non-having a non-driver's license, I think in and of itself, is not a very-is not logically relevant between-is not really logically relevant. Although there's no similarly situated Caucasian jurors that are of that mode.

But conceivably if you combine that with the fact that this-well, various different red-colored hair, that that condition in and of itself, I think, just not having a license would be clearly not a good enough rationale for a strike, to strike her. But in combining the others, and the Court's past experience with [the prosecutor], and watching the animosity that the juror had, and the Court's taking notice that a prosecutor can't themselves cause a strike because of how they question somebody, and I don't believe [the prosecutor]-the way [the prosecutor] asked [S.H.] was.

But [S.H.], I think, was taken aback by the questioning concerning the license. I'm not sure if she was offended. She appeared offended. But I'm not sure if that would play any role.

> But the-based on those reasons, I will deny the *Batson* challenge.

Subsequently, when the *Batson* question was raised again at the hearing on the motion for new trial, the judge described S.H.'s hair as "fluorescent" and an assistant prosecutor stated that S.H.'s hair "looked more like Ronald McDonald's red hair. It looked like clown red hair. It tended more towards the orange side."

It is clear from the record that the prosecutor and the judge went to great lengths to follow the letter of the law regarding *Batson* procedures and to assure that the peremptory strike was free of racial bias. The majority's stated concern, however, is that "the State and the trial court presume to identify difference from a limited cultural view," and as claimed by defense counsel during voir dire, that red hair is "quite fashionable in the African-American community." But the record shows not simply that S.H. had red hair, but that her hair was "red-a color of red brighter than the ink that comes out of a red pen or a marker," it was "crazy red hair," "fluorescent," "like Ronald McDonald's red hair," "like clown red hair." Even defense counsel speculated that S.H. may have been wearing a wig. Her hair was distinctive, to say the least, and did indeed "[make] her separate from the crowd, and [appear] very individualistic." This is indeed a race-neutral explanation.

A juror's appearance in *Batson* analysis has invariably been held to be a valid basis for exercising peremptory strikes. For instance, the trial court properly relied on *Purkett v. Elem,* in which the United States Supreme Court held that "the

prosecutor's proffered explanation in this case-that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard-is race neutral...." 514 U.S. at 769. Similarly, this Court in *State v. Williams,* 97 S.W.3d 462, 471 (Mo. banc 2003), approved a prosecutor's explanation for a peremptory strike "that the venireperson's earrings and clothing indicated that he was 'trying to be different' and was 'liberal.'" The Court explained that "[s]triking a prospective juror based upon clothing and attire does not reflect an inherent racial bias motivating the strike." *Id.* In my view, there is no logical way to distinguish these cases from the case at hand.

In addition, although S.H.'s appearance was the principal justification for the strike, the trial court expressly acknowledged that S.H. showed hostility toward the prosecutor. He also acknowledged that S.H.'s lack of a driver's license, though perhaps not enough in and of itself to justify the strike, was still a factor to be considered. Unfortunately, the majority dismisses these additional explanations without analysis except to say that S.H.'s hostile reaction was a "misperception."

Ultimately, the majority gives nothing but lip service to the fundamental tenets of *Batson* jurisprudence "that peremptory strikes are subjective, and great reliance is placed on the trial court's assessment of the legitimacy of the State's explanation." Under the totality of the circumstances, I am quite unwilling to convict the prosecutor and the judge of racial prejudice, and I would hold that the trial court's denial of the *Batson* challenge was not clearly erroneous.

I concur in the majority opinion to the extent that defendant is entitled to a new penalty phase trial because of the admission of evidence that defendant had been convicted of an earlier murder. The fact that the conviction was reversed on appeal after trial in this case mandates reversal here, too.

Stephen N. Limbaugh, Jr., Judge

St. Louis Post-Dispatch **METRO** Friday
March 23, 2007 **SECTION D**

Red hair: 'Why's that A problem?'

RULING IN DEATH PENALTY CASE Woman with red hair backs court, questions removal from case.

By Robert Patrick
St. Louis Post-Dispatch

The woman whose removal from a jury overturned a death penalty case said Thursday that though she never wanted to be on the jury, her hair or skin color shouldn't have led to her being barred.

In a 5-2 opinion, the Missouri Supreme Court reversed the conviction and sentence of Vincent McFadden on Tuesday, saying that prosecutors had removed a black woman with "carzy-looking red hair" for "racially discriminatory reasons."

Informed Thursday of the court's decision and her role in it, Sherlonda Harris, 26, told the Post-Dispatch that she did not want to serve on a jury that would be sequestered. She said she did not want to be stuck in a hotel and banned from going home to her two children or watching TV.

"I'm just not interested," she said.

The court majority said, "The State's justification for removing S.H. because of her hair color is not legitimate." A 1986 U.S. Supreme Court decision, Batson vs. Kentucky, said jurors cannot be removed because of their race.

Harris has toned down the oragne hair that lawyers and the judge variously described as "flourescent," "like Ronald McDonals's" and "clown red," but she says that her hair color should not have disqualified her as a juror.

"Why's that a problem?" she asked, adding, "white people have red hair."

Former prosecutor Mark Bishop told St. Louis County Circuit Judge Gary M. Gaertner Jr. during jury selection that Harris' hair color signaled an independent streak that might make it impossible to reach a unanimous decision, according to a hearing transcript.

But Bishop said the hair was not the only factor, suggesting she would be weak on the death penalty. He also cited a perceived hostility toward his side and her lack of a drivers license.

Harris denied being hostile or annoyed at the questions and said she had no problem being on a jury that was not sequestered.

Bishop was backed at the time by Gaertner, who said that in his experience with the prosecutor, he did not perceive him to be biased.

He also was supported by Judge Stephen N. Limbaugh, Jr. In a dissenting opinion, Limbaugh wrote that Bishop's reasons for striking Harris were valid and that Gaertner "expressly acknowledged" the hostility.

"I am quite unwilling to convict the prosecutor and the judge of racial prejudice," Limbaugh wrote.

Bishop, in an interview Tuesday, also denied that race was a factor in his decision.

St. Louis County Prosecutor Robert McCullough is preparing for another death penalty case next week and has said through employees that he can't comment on the case.

Even without Harris, McFadden's death sentence would have been reversed.

McFadden was convicted in 2006 on charges that he fatally shot his ex-girlfriend's sister, Leslie Addison, on May 15, 2003. During the penalty phase, jurors were told that he had already been convicted and sentenced to death in 2005 for fatally shooting Todd Franklin in 2002.

But the conviction was reversed the week before he was sentenced to death in the Addison shooting for similar issues.

In a 4-3 decision, Judge Ronnie L. White ruled that prosecutor Bishop had rejected some of the jurors for racially discriminatory reasons.

The Franklin murder conviction and death sentence were two of the six aggravating factors cited

by prosecutors in arguing that McFadden should get the death penalty in Addison's murder. However, because the Franklin conviction and sentence were tossed out, the sentence in the Addison case would not hold up.

The court's decision this week has spurred calls for an examination of jury selection in St. Louis County. Assistant Public Defender Janet M. Thompson, who argued the case in front of the Supreme Court, said the case should also "be of concern to the community."

"People don't even seem to understand that it's their right to serve," Thompson said. "African-Americans in St. Louis County are being denied their equal protection rights to serve."

08

(3)

06-1700
7-20-2007

STATEMENT OF THE CASE

In *State v. McFadden* (I), 191 S.W.3d 648 (Mo.banc), cert. denied, 127 S.Ct. 666 (2006), the Missouri Supreme Court found, under the totality of the circumstances, that the State's use of five peremptory challenges against black veniremembers was "merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons." *Id.* at 657. In this case, the same Assistant Prosecutor again exercised his peremptory challenges to remove black veniremembers. He peremptorily challenged four black women, leaving only one black woman on the jury. (T943)[1]. That woman was removed for hardship immediately before opening statements, thus, an all-white jury convicted Mr. McFadden and sentenced him to death. (T990-99). Defense counsel timely challenged the State's strikes[2] under *Batson v. Kentucky*, 476 U.S. 79 (1986). (T944).

The State provided three reasons for striking Ms. Harris, one of the black veniremembers. He stated Harris was the only person on the panel without a physical reason for not having a driver's license; she had "crazy-looking red hair," and her demeanor seemed hostile. (T950-51). He stated that her demeanor and responses made him believe she was lying to him about her ability to impose the

---

[1] Citations to the transcript are referenced "T__."
Citations to the Appendix to the Petition for Certiorari are referenced "App. at__."

[2] Of those five, trial counsel subsequently waived her *Batson* challenge to two and appellate counsel pursued two on appeal to the Missouri Supreme Court.(App. at 4); *State v. McFadden* (II), 216 S.W.3d 673 (Mo. banc 2007). That Court granted relief as to one of the struck venirepersons, Sherlonda Harris. (App. at 5); *McFadden II*, 216 S.W.3d at 675.

death penalty. (T950-51, 964-65). He later acknowledged that the "unlicensed driver" reason was not "that big of a deal." (T966). At sentencing, another Assistant Prosecutor stated, "This was not Lucille Ball red hair. This is more like Ronald McDonald's red hair. It looked like clown red hair. It tended more towards the orange side. She had indicated that she wanted to stand apart from the crowd by her physical appearance, it was so striking." (T1594).

Defense counsel countered the State's justifications. She stated that Harris's lack of a driver's license was irrelevant to her ability to sit and to the issues presented. (T962). When the State responded that her lack of a driver's license signified Harris was not "vested" in the community, defense counsel noted that a host of reasons may dictate why someone lacks a driver's license. She further noted that Harris was never asked why she had no license. (T966-68).

> Defense counsel also countered the State's "red hair" reason. She stated,
>
> I think you may be able to find numerous women in the community, particularly in the African-American community, that would have their hair dyed that color as a fashion statement. I think it's popular. There are very, very popular entertainers, such as Mary J. Blige, B-L-I-G-E, who have that same color hair. I don't think that the fact that her hair is that color red makes her crazy or weird, as Mr. Bishop has stated, I believe, off the record.

(T962). Counsel further noted that Harris was "very neatly," "very fashionably dressed. She did not appear to be crazy at all." (T962). Counsel went on, "While

her red hair might set her apart from Mr. Bishop's crowd, it certainly does not, I guarantee you, set her aside from her community of African-American women. So it makes it even actually more of a racial issue." (T967).

The trial court reviewed voir dire and Harris's "just very plain simply yes and no answers." (T968). He perceived Harris had been offended by the State's questions about her lack of a driver's license but found she did not seem offended by either side during death penalty voir dire. (T968-69). He was not even sure the questions offended her but thought they had. (T973-74). He found no logical relevance between the case and her lack of a driver's license. (T973-74). Finally, he stated that Harris's was a "very distinctive red hairstyle," which "does distinguish her and makes her separate from the crowd, and very individualistic." (T972-73).

The trial court initially opined, after researching the *Batson* issue, that he was inclined to disallow the prosecutor's strikes. (T1592). The prosecutor responded, in raised tones, that, if the court disallowed his strikes, he would be labeling the prosecutor a racist and a liar. (T1592). The trial court ultimately denied defense counsel's *Batson* challenges.

The Missouri Supreme Court reversed. *McFadden* II, 216 S.W.3d at 674; (App. at 2). It engaged in a fact-specific inquiry of the State's rationale for striking Harris. *Id.* at 676-77; (App. at 6-7). It noted the trial court had been "initially inclined to sustain McFadden's *Batson* challenges but then retreated." *Id.* at 676; (App. at 6). It noted that defense counsel had refuted the State's assertion

that Harris's hair color was "crazy," and had stated without challenge that Harris was neatly dressed. *Id.* at 676; (App. at 6). It noted that the State had misperceived Harris's reaction as hostile. *Id.* at 676, n. 17; (App. at 6). And, it noted the State's scrutiny of Harris's driver's license. *Id.*; (App. at 6-7). Further, it noted that, even were Harris's hair as unusual as the State posited, the State had failed to show how her "Ronald McDonald red hair" color was related to the case. *Id.* at 677; (App. at 7).

The State announced its intention pre-trial to introduce evidence of Vincent McFadden's conviction and death sentence in another case that was then on appeal to the Missouri Supreme Court. (T38). In this penalty phase, the State introduced the certified copy of that conviction and presented photographs, a diagram of the scene and a video of that victim's body. (T1294-1311). In penalty phase closing, the State argued that the jury should consider Mr. McFadden's criminal history, including his prior death sentence, in deciding his punishment in this case. (T1543-46). In sentencing Mr. McFadden to death, the jury found, as two of six statutory aggravating circumstances, Mr. McFadden's first-degree murder and armed criminal action convictions. *McFadden* II, 216 S.W.3d at 677; (App. at 8).

After trial but before formal sentencing by the court, the Missouri Supreme Court reversed the death sentence upon which the jury's finding in this case was partially predicated. *McFadden* I, 193 S.W.3d. 648; (App. at 8). Defense counsel here requested that the trial court grant a new trial based on that decision. (T1574). The trial court refused and sentenced Mr. McFadden to death.

The Missouri Supreme Court found that, because "the jury's recommendation in this case was based partly on factors that this Court nullified, the sentence cannot stand." *McFadden* II, 216 S.W.3d at 677; (App. at 8). The Court rejected the State's argument that this Court's decision in *Johnson v. Mississippi*, 486 U.S. 578 (1988), does not mandate reversal. The State had argued that, even if the prior convictions and death sentence were not properly considered as statutory aggravating circumstances, the underlying facts of the offenses would still be admissible as non-statutory aggravating circumstances. *Id.* at 678; (App. at 9-10).

The Court also rejected the State's argument that this Court's decision in *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006), precludes relief. *Id.*; (App. at A-10). It held, under this Court's decision in *Brown*, that "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *McFadden* II, 216 S.W.3d at 677, citing *Brown*, 126 S.Ct. at 892, citing *Stringer v. Black*, 503 U.S. 222, 232 (1992); (App. at 10).

SUMMARY OF THE ARGUMENT

In this second of two cases involving the same Assistant Prosecutor and this Respondent, the Missouri Supreme Court again properly followed procedures implemented following *Batson v. Kentucky*, 476 U.S. 79 (1986), and continuing to the present. In deciding whether Mr. McFadden met his burden of proving the prosecutor's discriminatory intent in removing black veniremembers, which removal left Mr. McFadden with an all-white jury, the Court considered the totality of the circumstances. The Court found that Mr. McFadden had met his burden of showing that, at step three of the *Batson* analysis, the prosecutor's explanations were merely pretexts for racial discrimination.

This Court has allowed each state judiciary to formulate its own particular mechanism to implement *Batson*. The Missouri Supreme Court should be allowed to determine when and how a defendant meets his burden of production and persuasion at step three of that analysis. The Missouri Supreme Court's holding here is limited to Missouri. It is fact-driven and fact-dependent. The Missouri Supreme Court applied the proper standard of review to those facts. The State of Missouri's displeasure with the result of the Missouri Supreme Court's careful application of long-standing precedent does not merit this Court's review. This opinion has no more import than any other state court opinion on a *Batson* claim. Contrary to the State of Missouri's suggestion that the Missouri Supreme Court has ignored this Court's holding in *Purkett v. Elem*, 514 U.S. 765 (1995),

the Missouri Supreme Court's decision conforms to *Purkett* and *Batson*. The Missouri Supreme Court found, at step three of the *Batson* analysis, that the prosecutor's rationale was a pretext for racial discrimination. The State of Missouri erroneously asserts that, if a justification is facially-neutral, the inquiry ends. The State thus requests that this Court review this case based upon its own flawed interpretation of *Batson*.

The State of Missouri's displeasure with the Missouri Supreme Court's application of *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006), is similarly insufficient to warrant this Court's review. The State of Missouri ignores both common sense and the plain language of *Brown*. It categorically states that informing a jury that a defendant was sentenced to death in another case adds nothing to the evidentiary facts and circumstances of the offense that it has considered as a sentencing factor.

The State of Missouri also misrepresents the record by stating that defense counsel injected the issue of the defendant's prior death sentence into the case. The record reveals that the Assistant Prosecutor maintained his intent to adduce that evidence pre-trial and then, in penalty phase, carried through on that promise. Because defense counsel's objections were overruled, she was forced to voir dire on the subject. Under the unique circumstances of this case, this action cannot be construed as having opened the door to evidence of Mr. McFadden's prior, invalid death sentence.

REASONS FOR DENYING THE WRIT

I. The Missouri Supreme Court followed long-standing precedent in evaluating the totality of the circumstances at step three of the *Batson* analysis.

The State condemns the Missouri Supreme Court for holding that the trial court clearly erred in denying Mr. McFadden's challenge, under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the exclusion of Sherlonda Harris. The Missouri Supreme Court analyzed this claim in full accord with well-established precedent, both of this Court and Missouri courts. Considering the record made at step three of the *Batson* analysis, it found, under the totality of the circumstances, that the prosecutor's reasons for striking Ms. Harris were no more than pretexts for racial discrimination. Its holding has no more import than any other state court opinion on a *Batson* claim.

In evaluating claims of racial discrimination in jury selection, lower courts follow a three-step procedure. *Id.* at 93-98. First, the defendant must demonstrate a prima facie case of purposeful discrimination. *Id.* at 93-96. Second, the State must come forward with clear, specific, and legitimate race-neutral explanations for its strikes. *Id.* at 97, 98 n.20. Third, the trial court must determine if the defendant has established purposeful discrimination. *Id.* at 98.

At the third step, the trial court must consider whether "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93-94, citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976). To this end, the trial

court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93, quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). The trial court must "assess the plausibility [of the State's justifications for its strikes] in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2331 (2005).

As this Court has noted, at step two, the prosecutor's rationale need not be persuasive or even plausible. *Purkett*, 514 U.S. at 768. The issue at that step is the "facial validity" of the explanation. *Id.* "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*, citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991). It is at step three of the process that "the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett*, 514 U.S. at 768; *Batson*, 476 U.S. at 98.

As this Court has instructed, Missouri courts are to consider the totality of the circumstances in reviewing claims of racial discrimination in jury selection. In determining whether a prosecutor has engaged in purposeful discrimination, trial courts are instructed to "take into account a variety of factors. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992). The first factor, and the "chief consideration," is the "plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." *Id.*; see also *State v.*

Edwards, 116 S.W.3d 511, 527 (Mo. banc 2003). Second, the court should consider the existence of similarly situated white jurors not struck by the State. *Id.* Third, it should consider the "degree of logical relevance" between the explanation and the case to be tried in terms of the nature of the evidence and the potential punishment. *Id.* Fourth, it should consider the prosecutor's statements and demeanor during voir dire, and the demeanor of the excluded jurors. *Id.* Fifth, it should consider the court's past experiences with the prosecutor, and sixth, it should consider "objective factors bearing on the state's motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim and the material witnesses." *Id.*; *Parker*, 826 S.W.2d at 939-40.

Here, the Missouri Supreme Court conducted the analysis mandated by this Court and by its own precedent regarding *Batson* claims. The Court found that the State had expressed three justifications for peremptorily striking Ms. Harris: first, she lacked a driver's license; second, she seemed hostile; and third, she had "crazy red hair." *McFadden* II, 216 S.W.3d at 675; (App. at 4-5). The Court noted that the trial court itself had rejected the first two justifications, finding Harris's lack of a driver's license irrelevant and perceiving that Harris was not hostile but "merely exasperated by the State's interrogation concerning the

license." *Id.*; (App. at 5).[3] The Court found "a clear *Batson* violation in the State's removal of S.H. for having red hair." *Id.*; (App. at 5).

The Missouri Supreme Court reached this conclusion after analyzing the totality of the circumstances. *Id.* at 676; (App. at 6). It noted that a strike based on clothing and attire, or indeed, on hair color, does not reflect an inherent racial bias. *Id.*; (App. at 6). Thus, since the prosecutor had articulated a rationale in which discriminatory intent was not inherent, the *Batson* inquiry would not stop at step two, but would proceed to the third step. *Purkett*, 514 U.S. at 768.

The Court went on to note that defense counsel had refuted the State's conclusion that Harris's hair color was "crazy," *McFadden* II, 216 S.W.3d at 676; (App. at 6), since the State had not contested counsel's record statements that, while the Harris's hair color might be unusual in the white community, it was common in the African-American community and "very, very popular entertainers, such as Mary J. Blige... have that same color hair." (T962). The Court additionally found that defense counsel had noted Harris was neatly dressed, thus refuting the State's allegation that Harris was "crazy" or "weird," as manifested through her hair color. *McFadden* II, 216 S.W.3d at 676; (App. at 6).

The Court further noted that, while deference is accorded to the trial court's assessment, that deference is not a rubber-stamp. *Id.*; (App. at 6). Indeed,

---

[3] The State has not challenged that aspect of the Missouri Supreme Court's conclusion here. See, Cert. Pet. at 7-12. Therefore, the only question is whether the court's conclusion that the "red hair" justification was a pretext for racial discrimination was reached in accordance with established precedent.

as this Court has stated, "[d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 125 S.Ct. at 2325; quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Especially in this case, the Missouri Supreme Court suggested, deference was inappropriate since the trial judge's initial inclination was to grant Mr. McFadden's *Batson* challenges but he then retreated. *McFadden* II, 216 S.W.3d at 676; (App. at 6). While the Missouri Supreme Court does not elaborate, the record clearly demonstrates that the trial court only "retreated" after the Assistant Prosecutor responded, in raised tones, that such a decision would label him a racist and a liar. (T1592).

Finally, the Missouri Supreme Court considered all of the circumstances surrounding the strike of Ms. Harris, including the two justifications that even the trial court had found illegitimate. *Id.*; (App. at 6-7). The Court found, on that basis, that the prosecutor's[4] explanations were "implausible and merely a pretext to exercise a peremptory strike for racially discriminatory reasons." *Id.* at 677; (App. at 7).

The State argues here that, "In short, without even mentioning *Purkett v. Elem*, the Missouri Court simply applied a racial gloss to a physical characteristic that this Court has previously deemed to be race neutral." (Cert. Pet. at 10). The State's argument ignores the Missouri Supreme Court's opinion that clearly

[4] Although the Court did not specifically mention that the same prosecutor found to have exercised his peremptory challenges in a racially-discriminatory fashion in *McFadden* I was the prosecutor here, that factor may have been sub-text to the totality of the circumstances it considered.

applied the appropriate analysis under *Batson*, finding, at the third step, that the State's "crazy red hair" justification was a pretext for racial discrimination, given the totality of the circumstances.

The faulty premise of the State's argument becomes crystal clear in its final assertion: "And by finding a facially race-neutral explanation to be discriminatory, the Missouri Supreme Court disregarded any consideration of the prosecutor's actual beliefs and motives, and instead adjudged the case solely through the prism of its own perceptions." (App. at 11-12). The State has engaged in the same misunderstanding for which this Court in *Purkett* called the Eighth Circuit to task—combining steps two and three of the *Batson* analysis. *Purkett*, 514 U.S. at 768. Just because a justification is facially race-neutral does not end the inquiry. If it is, it will survive step two. The question is whether, at step three, it survives scrutiny under the totality of the circumstances. Here, the Missouri Supreme Court determined that the State's justification did not. The Missouri Supreme Court properly applied the clear error standard of review.

The result in this case is fact-driven. It is based upon the Missouri Supreme Court's thorough review of the totality of the circumstances in this particular case. Contrary to the State's dire warnings, (Cert. Pet. at 10-12), it is therefore unlikely to have wide effect. Further, contrary to the State's assertions, the Missouri Supreme Court correctly applied this Court's decisions in *Batson* and *Purkett*, and, after reviewing the totality of the circumstances at step three of the process, found that the State's justification was a pretext for racial

discrimination. The Missouri Supreme Court should be allowed to determine when and how the defendant is to meet his burden of production and persuasion.

Mr. McFadden respectfully requests that the petition for a writ of certiorari be denied.

II. The Missouri Supreme Court's decision correctly applied *Brown v. Sanders.*

In its brief to the Missouri Supreme Court, the State argued that this Court's decision in *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006) compelled the conclusion that no constitutional error occurred when Mr. McFadden's jury heard that another jury had sentenced him to death, a death sentence that the Missouri Supreme Court subsequently invalidated in *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006). The Missouri Supreme Court unanimously rejected that argument. It found unpersuasive

> the State's implication that the Franklin convictions and death sentence were not critical to the jury's decision-making process. Of the six statutory factors on which the jury based its death penalty recommendation, only the two relating to the Franklin case involved a homicide. The other four involved assault and armed criminal action. The State implies that the jury's recommendation would have been the same based on these four weaker remaining factors.

McFadden II, 216 S.W.3d at 678; (App. at 10). The Missouri Supreme Court noted that, even if the underlying facts of the homicide were admissible, it could

not "assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that McFadden was already sentenced to death." *Id.*; (App. at 11).

The Missouri Supreme Court's opinion is thus directly in accord with this Court's recent decision in *Brown*. There, this Court stated that

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Brown, 126 S.Ct. at 892 (emphasis in original). Under this analysis, therefore, the jury's decision will be skewed by its consideration of that invalid factor unless it could have considered that same factor under another, valid sentencing factor. *Id.*, citing *Stringer v. Black*, 503 U.S. 222, 232 (1992).

The State's argument, both in the Missouri Supreme Court and here, is that, since the jury properly could consider evidence of the other homicide, it could make no difference to its determination of punishment that it was told that another jury had sentenced Mr. McFadden to death. (Cert. Pet. at 12-13). In fact, the State specifically argues to this Court that, since "the jury could properly give aggravating weight to that evidence [of the other homicide] as a non-statutory circumstance, ... [the evidence met] the *Brown* standard." (Cert. Pet. at 13).

The State's own argument shows its faulty premise. The State presented the fact of Mr. McFadden's conviction of first degree murder under the rubric of a specific statutory aggravating circumstance—that Mr. McFadden had a serious assaultive criminal conviction. §565.032.2(1) RSMo (2000). The specific facts of the homicide itself are different, under Missouri law, than the fact of a serious assaultive criminal conviction.

Further, the specific facts of this case clearly demonstrate the State's belief at trial of the aggravating nature of a prior death sentence. The State before this Court ignores the record in this regard and attempts to blame defense counsel for placing this issue before the jury. (Cert. Pet. at 14). The record demonstrates otherwise.

Well before trial, defense counsel moved that the jury not be informed of the death sentence in the other case. (LF190-03). The Assistant Prosecutor stated that he intended to introduce the certified copy of the prior conviction and the fact of the death sentence. (T38). Specifically, he told the trial court that he believed that he needed to adduce evidence of the death sentence to show the seriousness of the offense. (T39). Despite the trial court's warning, the Assistant Prosecutor remained obdurate in his intention to adduce that evidence. (T43-44). In penalty phase, he presented records showing not just the conviction but also the death sentence, and showed the jury photographs, a diagram of the crime scene and a video of the body. (T1289-91). He argued, in penalty phase closing, that the jury should consider Mr. McFadden's criminal history, including the death sentence,

as they decided his punishment. (T1543-46). The jury found six statutory aggravating circumstances—two arising out of the prior homicide. (LF391-92).

Defense counsel repeatedly objected to the State's actions and, with the trial court's approval, specifically stated that the Assistant Prosecutor's insistence upon presenting evidence of the other death sentence obligated her to voir dire about the effect of that sentence upon the veniremembers. (T41-43). Defense counsel noted that such evidence was a critical fact upon which voir dire was required. *State v.Clark*, 981 S.W.2d 143, 147 (Mo.banc 1998). She further noted that, without such voir dire, designed to identify those unqualified jurors who, as a result of that information, would harbor bias or prejudice, Mr. McFadden's right to an impartial jury would be denied. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

The State attempts to argue that the Missouri Supreme Court's decision runs afoul of *Romano v. Oklahoma*, 512 U.S. 1 (1994) because, it asserts, *Romano* stands for the proposition that "a holding that admission of the evidence [of a prior death sentence] rendered the sentencing proceeding fundamentally unfair 'would ... be an exercise in speculation, rather than reasoned judgment.'" (Cert. Pet. at 14); *Romano*, 512 U.S. at 14. The State ignores the procedural history in *Romano* to reach its conclusion.

In *Romano*, the State introduced a copy of the judgment and sentence from one death penalty trial in the penalty phase of another trial. The former was

subsequently overturned and the Petitioner challenged the admission of that evidence in the latter on various grounds on appeal. *Id.* at 5-6.

Among those grounds was that the admission of this evidence violated *Johnson v. Mississippi*, 486 U.S. 578 (1988). Although the prior death penalty conviction was the only evidence that supported the submission of the "prior violent felony" aggravating factor, this Court found no *Johnson* violation. *Romano*, 512 U.S. at 11. This Court distinguished *Johnson* because the intermediate appellate court had struck the "prior violent felony" aggravating factor, reweighed the other aggravating factors, and concluded that the death penalty was warranted, even without that specific aggravator. *Id.*[5] This Court found that process consistent with precedent. *Id.* It went on to address the separate due process claim of whether the introduction of the subject evidence rendered the death sentence so unreliable as to violate due process. *Id.* at 12-13. Citing the lower court's opinion, the Court again noted that the untainted aggravators still outweighed the mitigating circumstances, *Id.* at 13, and, stated that, even if the jury considered the evidence in question, it was "impossible to know how this evidence might have affected the jury." *Id.* at 14. Since this Court could but speculate about this effect, it could not find the penalty phase proceeding had been rendered fundamentally unfair. *Id.*

---

[5] Although not for resolution in this case, whether such a process would be constitutionally viable post-*Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is questionable.

The Missouri Supreme Court's decision does not conflict with *Romano* since, as in *Johnson*, it cannot be presumed that, absent that invalid aggravating factor, the jury would have rendered a death verdict. Rather, it comports with this Court's recent decision in *Brown*. After all, "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Brown*, 126 S.Ct. at 892, citing *Stringer v. Black*, 503 U.S. 222, 232 (1992).

Because the Missouri Supreme Court's decision is entirely within the parameters of this Court's recent decision in *Brown v. Sanders* and conflicts with no controlling precedent of this Court, Mr. McFadden respectfully requests that this Court deny the State's petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, Mr. McFadden respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

Janet M. Thompson
Counsel of Record
Assistant Public Defender
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
(573) 882-9855
Attorney for Respondent